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**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

CITY AND COUNTY OF SAN FRANCISCO,  
et al.,

## Plaintiffs,

V.

PURDUE PHARMA L.P., et al.

### Defendants.

Civil Case No.: 3:18-CV-07591-CRB

## DEFENDANTS' STATUS REPORT

Hearing Date: February 26, 2020  
Hearing Time: 12:00 p.m.  
Hearing Place: Courtroom 6

Honorable Charles R. Breyer

This case is in most respects at the very earliest stage. No defendant has answered or otherwise responded to the Complaint, and defendants have not yet had the opportunity to seek or obtain any discovery. While plaintiffs have the advantage of extensive discovery taken from some of the defendants that also are named in other cases, this complex case is in all other material respects at the very beginning.

As the Court has requested, this status report describes the extensive discovery defendants expect to require and estimates, based on defendants' experience in other cases and their knowledge of the pleadings here, the minimum time necessary to complete that discovery. But defendants first offer some brief background about this case and its status.

1       **I. The Status of the National MDL**

2       This case was filed on December 18, 2018 and on January 22, 2019 transferred to MDL 2804  
 3 before Judge Dan Polster in the Northern District of Ohio. It has been stayed ever since, along with  
 4 more than 2,600 other cases pending in MDL 2804. In April 2018, Judge Polster designated three cases  
 5 brought by Ohio counties and municipalities as “Track One” cases. Discovery proceeded only in those  
 6 cases. Plaintiffs obtained “national” discovery of many of the defendants here (e.g., activities relating to  
 7 their general corporate policies and practices) and case-specific discovery focused on their activities in  
 8 Northern Ohio. Defendants were permitted to take discovery relating to the claims of the Track One  
 9 plaintiffs only, including discovery addressing issues such as causation, injury, damages, and the statute  
 10 of limitations as it pertained to the claims of those Northern Ohio plaintiffs. No discovery was taken in  
 11 the MDL concerning San Francisco (or any other part of California), and no legal issues under  
 12 California law were addressed.

13       All other cases in MDL 2804 – including this case – remained stayed, with a complete  
 14 moratorium on case filings with few exceptions, two of which are relevant to understanding the posture  
 15 of this action. First, plaintiffs in the stayed cases were authorized to file “short form” amended  
 16 complaints to add defendants and incorporate allegations from other pleadings. Plaintiffs here filed such  
 17 a short-form amendment on April 22, 2019, which defendants attach as Exhibit A. That short-form  
 18 amendment, which is not yet on the formal docket in this Court, is important to understanding the full  
 19 extent of the parties and claims at issue. Second, the plaintiffs in the stayed cases were required to  
 20 provide abbreviated fact sheets with basic information about their claims. Plaintiffs’ fact sheet is  
 21 attached as Exhibit B.

22       No motions or other responses to either plaintiffs’ original complaint or their short-form  
 23 amended complaint were permitted in the MDL. Thus, in this case, even threshold issues remain  
 24 unresolved, such as whether plaintiffs have stated a claim for relief and whether the Court has personal  
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1 jurisdiction over all defendants.<sup>1</sup> And defendants in this action have taken no party or third-party  
 2 discovery addressing plaintiffs' claims.

3 The sole area in which this case is not at the very earliest stage is in discovery taken by plaintiffs  
 4 from most (but not all) defendants. In response to discovery propounded by the Plaintiffs' Executive  
 5 Committee ("PEC") in the MDL, which was charged with pursuing this role on behalf of all MDL  
 6 plaintiffs as well as the individual Track One plaintiffs, defendants in the Track One cases (which  
 7 included most of the defendants named in this case) produced massive amounts of discovery, including  
 8 many millions of pages of documents and responses to hundreds of interrogatories. Hundreds of  
 9 depositions were taken of defendants' witnesses. While some of this discovery was specific to Northern  
 10 Ohio, most of it was national in scope and not limited to information relevant to the Track One  
 11 plaintiffs' cases. Plaintiffs have access to all of this discovery from defendants, and it is likely to form  
 12 the substantial majority of the evidence they will use in this case.

13 However, there are at least two defendants to this lawsuit that have not been subject to any  
 14 discovery in the MDL or any meaningful discovery in other opioid matters pending in federal or state  
 15 courts nationwide. West-Ward Pharmaceuticals (n/k/a/ Hikma Pharmaceuticals USA Inc.) is a generic  
 16 manufacturer that was neither involved in, nor named in, any of the MDL Track One and MDL  
 17 Track Two cases in which discovery was taken. While Hikma has been named as a defendant in a few  
 18 state court opioid matters, those unrelated opioid lawsuits have not advanced to the stage where Hikma  
 19 has been required to produce any documents or has even negotiated a scope of production. No Hikma  
 20 employees have been deposed. Hikma also has not taken any discovery of any governmental plaintiff.

21 Defendant Noramco, Inc. is in a similar position. Noramco, Inc., is an active pharmaceutical  
 22 ingredient manufacturer which does not (and did not at all material times relevant to this litigation)  
 23 manufacture, package, promote, brand, market, distribute, or sell the finished drug products at issue in  
 24 this litigation. While it was a defendant in the MDL Track One cases, plaintiffs did not pursue

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25  
 26 <sup>1</sup> Contrary to the assertion by plaintiffs in their short-form amendment, not all defendants have been  
 27 served. For example, several domestic and non-U.S. defendants have not been served, and (even if they  
 28 had been) questions of personal jurisdiction as to any foreign defendant will need to be resolved through motion practice.

discovery against it, prompting Judge Polster to sever it from the Track One trial. It was also severed from Track Two. In the few state cases in which Noramco is a party, discovery is either ongoing or has not started. No party depositions have been taken of Noramco employees.

Thus, while this case may be far along with respect to plaintiffs' discovery, it is effectively a brand new case for defendants, and it must be litigated on the type of full schedule required for a complex case with multiple claims and multiple, differently-situated, defendants.

## **II. Dispositive Motions**

No defendant has answered or otherwise responded to the Complaint, and some have not been served. Defendants intend to move to dismiss the Complaint on multiple grounds, including failure to state a claim. These motions will address important threshold legal issues. Some defendants will also move to dismiss for lack of personal jurisdiction.

Defendants propose that all Rule 12 motions by those entities that have been served be due by April 13, 2020.

Defendants believe that the most efficient course is to resolve those threshold motions before discovery commences, as the Court's ruling on those motions is likely to streamline the case at a minimum and assist the parties in focusing their discovery efforts in an efficient manner.

## **III. Status of Discovery**

### **A. Discovery of Defendants**

Plaintiffs' counsel here serve on the Plaintiffs' Executive Committee in the MDL and, as such, have actively participated in more than a year of discovery from most of the defendants, receiving millions of pages of documents and taking scores of depositions. Defendants assume that plaintiffs intend to seek additional discovery from defendants of information particular to San Francisco that was not specifically at issue in the MDL. Plaintiffs have not yet propounded any non-MDL discovery on defendants, nor have the parties discussed the additional discovery plaintiffs intend to seek from defendants.

### **B. Discovery of Plaintiffs**

Discovery of the City and County of San Francisco has not yet begun. As plaintiffs' fact sheet (Exhibit B) makes clear, the amount of discovery that will be needed here is substantial. So far,

1 plaintiffs' only "production" of documents has consisted of 18 documents comprising 156 pages  
 2 attached to their fact sheet. They have not answered a single interrogatory, produced a single witness  
 3 for deposition, or produced any documents in response to discovery requests.

4 This is not the kind of case in which discovery requirements can or should be largely one-sided.  
 5 As discussed further below, in these cases defendants require at least as much discovery as do plaintiffs  
 6 – and given the immense head start plaintiffs have here, the vast majority of the discovery that remains  
 7 to be done will be that taken by defendants. Before Judge Polster, discovery of plaintiffs Cuyahoga  
 8 County and Summit County – which included production of millions of pages of documents and scores  
 9 of depositions – took 18 months to complete.

10 Discovery of the plaintiffs is critical to probe plaintiffs' allegations about the impact of opioid  
 11 abuse on San Francisco and the State of California, including whether and to what extent defendants'  
 12 alleged conduct affected plaintiffs' governmental operations; when plaintiffs knew or should have  
 13 known of their claims; and whether plaintiffs can prove the necessary element of causation. Plaintiffs'  
 14 claims depend on proof of proximate causation between their alleged injuries and the conduct alleged.  
 15 Defendants will seek discovery to confirm that plaintiffs cannot prove the required links between  
 16 defendants' manufacture or shipment of prescription opioids and plaintiffs' alleged injuries, most of  
 17 which allegedly resulted from the importation and abuse of illegal heroin and fentanyl. Additionally,  
 18 discovery will be sought to identify the myriad acts of wrongdoing by many independent actors – such  
 19 as those engaged in the criminal diversion of opioids and their illicit use – which destroy any purported  
 20 chain of causation.

21 Plaintiffs allege that they have incurred damages including "the costs of treating opioid  
 22 addiction," "the costs of maintaining harm reduction, overdose prevention and education on the dangers  
 23 of opioid use," "special costs incurred by San Francisco for the public safety, health and welfare of its  
 24 citizens," and "the economic harm to San Francisco resulting from the addiction epidemic." Complaint  
 ¶ 265. Defendants will need discovery on all of plaintiffs' alleged costs or other damages, as well as  
 25 associated evidence relating to those alleged damages that are in plaintiffs' exclusive possession.  
 26

27 Defendants have learned from experience in these cases (both in Track One and in cases pending  
 28 in state court) that discovery from a municipal defendant on claims like these can be complicated and

1 difficult.<sup>2</sup> Necessary information and documents are typically spread across multiple different  
 2 municipal agencies and employees. State and federal programs intersect with – and in some instances  
 3 pay for – municipal programs. The challenge is enhanced by the fact that plaintiffs purport to assert  
 4 claims addressing conduct and events going back more than a decade.<sup>3</sup>

5 In short, in contrast to the tremendous amount of discovery taken of defendants, discovery has  
 6 not yet even begun on a wide array of facts that are necessary for defendants to present their defenses.<sup>4</sup>

### 7 C. Third-Party Discovery

8 Defendants will also need to pursue extensive, jurisdiction-specific third-party discovery,  
 9 including from state and federal entities and third-party payors. This discovery will establish potential  
 10 alternative causes of plaintiffs' alleged injury, which is crucial to defendants' causation case. Plaintiffs  
 11 sue only certain pharmaceutical manufacturers and wholesale distributors, but no prescription opioid pill  
 12 could reach a patient without a physician's decision to prescribe it and a pharmacist's decision to  
 13 dispense it. Even if these third parties are not at fault, their independent conduct goes directly to a core  
 14 issue in this case: lack of causation. Moreover, much of plaintiffs' alleged harm resulted from use of  
 15 illegal opioids, which could have no impact on plaintiffs absent the intervening conduct of multiple  
 16 criminal actors. In other cases asserting similar claims, there has been extensive discovery of federal  
 17 and state law enforcement concerning these and related issues.

18 Defendants expect discovery from state agencies to be particularly extensive, including, but not  
 19 limited to, discovery from the California Board of Pharmacy, which administers and enforces the  
 20 California Uniform Controlled Substances Act and its implementing regulations; the California

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21  
 22 <sup>2</sup> Indeed, one of the original Track One plaintiffs, the City of Cleveland, had to be dropped from  
 Track One after it became clear that it could not meet its discovery obligations.

23  
 24 <sup>3</sup> Defendants naturally expect to assert the statute of limitations as to any claims that accrued prior to the  
 applicable limitations period. But until that issue is resolved in their favor, they must pursue discovery  
 covering the entire period plaintiffs' claims purport to cover.

25  
 26 <sup>4</sup> A few of the defendants here are also defendants in an action pending in state court in Orange County  
 brought by that county and a few other governmental entities. That Orange County action involves only  
 a small subset of the defendants in this action (four of the manufacturer defendants) and a different (and  
 smaller) set of claims. While those defendants have taken discovery in that case, such discovery has  
 been mainly directed to the plaintiff jurisdictions at issue in that litigation and the claims in that case,  
 and was not directed at San Francisco or the variety of claims asserted by it here.

1 Department of Justice, which administers the State's Controlled Substance Utilization Review and  
 2 Evaluation System (California's prescription drug monitoring program); state professional boards that  
 3 license and regulate physicians, dentists, nurses, and other medical professionals who may have  
 4 improperly prescribed or administered controlled substances; and state agencies that administer medical  
 5 insurance programs, including Medicaid.

#### 6 IV. Limitations on Discovery and Timing of Discovery

7 In light of the number of defendants and the complexity of this case, modifications to the  
 8 presumptive limitations on discovery under the Federal Rules of Civil Procedure will be necessary. The  
 9 parties have not yet discussed appropriate limitations. Defendants propose that the Court address  
 10 appropriate limitations on discovery only after resolution of defendants' planned motions to dismiss,  
 11 together with an appropriate case schedule.

12 Defendants estimate that fact discovery will take approximately **18 months**. This is the same  
 13 amount of time required for discovery in Track One and in cases that are being litigated in state court.

#### 14 V. Expert Discovery

15 After fact discovery closes, the parties will need to engage in extensive expert discovery.  
 16 Plaintiffs' case likely will rest largely on their expert reports and testimony, including to show alleged  
 17 misconduct, causation, and damages. The MDL Track One plaintiffs named 23 experts, and plaintiffs  
 18 here likely will name a similar number. Defendants will need to disclose, produce reports, and offer  
 19 depositions of an even larger number of experts in response, given the multitude of defendants that  
 20 plaintiffs have chosen to sue under a variety of different theories. Defendants estimate that expert  
 21 discovery will require an additional **three months** following the close of fact discovery.

#### 22 VI. Pretrial Motions

23 Following expert discovery, there are likely to be multiple motions for summary judgment and  
 24 *Daubert* motions. Once summary judgment and *Daubert* motions are resolved and the general scope of  
 25 trial (if any) is clear, the parties will require time for motions *in limine* and pretrial hearings.

26 \* \* \*

For the foregoing reasons, defendants therefore respectfully request that the Court set deadlines only for briefing and a hearing on defendants' motions to dismiss, with further deadlines to be set following resolution of those motions.

Respectfully Submitted,

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## ATTESTATION

I, Sonya Winner, hereby attest, pursuant to N.D. Cal. Civil L.R. 5-1, that the concurrence to the filing of this document has been obtained from each signatory hereto.

DATED: February 19, 2020

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